

# HOUSE BILL REPORT

## E2SHB 1114

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**As Passed House:**  
March 11, 2013

**Title:** An act relating to criminal incompetency and civil commitment.

**Brief Description:** Addressing criminal incompetency and civil commitment.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Pedersen, Rodne, Morrell, Nealey, Green and Jinkins).

**Brief History:**

**Committee Activity:**

Judiciary: 1/24/13, 2/12/13 [DPS];

Appropriations: 2/19/13, 3/1/13 [DP2S(w/o sub JUDI)].

**Floor Activity:**

Passed House: 3/11/13, 87-11.

**Brief Summary of Engrossed Second Substitute Bill**

- Requires that evaluations for involuntary treatment of individuals who have had felony charges dismissed due to incompetency occur at state hospitals.
- Modifies procedures and standards for involuntary treatment of persons who have been deemed incompetent to stand trial for violent felonies.
- Provides additional notification and review requirements for release of certain involuntarily detained people.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Goodman, Hope, Jinkins, Kirby, Klippert, Nealey, Orwall and Roberts.

**Minority Report:** Do not pass. Signed by 1 member: Representative Shea.

**Staff:** Omeara Harrington (786-7136).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 26 members: Representatives Hunter, Chair; Alexander, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Carlyle, Dahlquist, Dunshee, Fagan, Haigh, Haler, Harris, Hudgins, Hunt, Jinkins, Kagi, Maxwell, Morrell, Parker, Pedersen, Pettigrew, Ross, Schmick, Seaquist, Springer and Sullivan.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Ormsby, Vice Chair; Cody, Green, Pike and Taylor.

**Staff:** Andy Toulon (786-7178).

### **Background:**

#### Incompetency.

A person is incompetent to stand trial in a criminal case if he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in his or her own defense. A court may require a competency evaluation of a defendant whenever the issue of competency is raised, and a person who is incompetent may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

If a person is found incompetent to stand trial, the court must stay the criminal proceedings and, depending on the charged offense, either order a period of treatment for restoration of competency, or dismiss the charges without prejudice. If the defendant undergoes restoration but cannot be restored to competency within the designated time period, the criminal case must be dismissed without prejudice.

#### Evaluations and Petitions for Involuntary Treatment.

If a person's competency is not restored and charges have been dismissed, the person will be considered for commitment in the civil system. The Involuntary Treatment Act (ITA) sets forth the procedures, rights, and requirements for an involuntary civil commitment. If the court dismisses felony charges, the person is transferred to a hospital or secure mental health facility for up to 72 hours for purposes of an involuntary treatment evaluation. The statute addressing felony dismissals also allows the court to order the defendant's release. At the end of the 72-hour period, a petition may be filed for either 90 or 180 additional days of treatment, depending on the underlying dismissed charge.

#### Grounds for Involuntary Treatment After a Felony Dismissal.

A person who has had felony charges dismissed due to incompetency may be detained for a period of 180 days if the petitioner can prove by clear, cogent, and convincing evidence that the person has committed acts constituting a felony, and as a result of a mental disorder, the person presents a substantial likelihood of repeating similar acts. If the grounds for commitment have been proven, but treatment less restrictive than detention will be in the best interest of the person or others, the court may order a less restrictive alternative placement for the term of commitment. No order of commitment under the ITA may exceed 180 days, but

commitment may be renewed upon successive petitions and hearings. The grounds on subsequent petitions match those for the initial petition for commitment, but additional factors are considered in the analysis of likelihood of repeating similar acts, including life history, progress in treatment, and the public safety.

#### Release of Involuntarily Detained People.

The Department of Social and Health Services (DSHS) must give advance written notice of a change in a detained person's detention status to the chief of police and sheriff in the person's jurisdiction of residence, and to victims and witnesses who have requested notice. Notice is required at least 30 days prior to release, authorized leave, or transfer to another facility, or upon escape, of a person who is committed after a dismissal of a sex, violent, or felony harassment offense.

Legislation in 2010 created a public safety review panel to independently review and assess the DSHS's proposals for conditional release, furlough, temporary leave, and similar changes in commitment status of people found not guilty by reason of insanity (NGRI). The panel provides written determinations of the public safety risk presented by any release recommendation, and may offer alternative recommendations. The panel's recommendations are submitted to the court with the DSHS recommendations.

The panel must submit a report to the Legislature by December 1, 2014, regarding observed changes in statewide consistency of evaluations and decisions concerning changes in the commitment status of persons found NGRI. The panel's report will also address whether the panel should be given the authority to make release decisions and monitor release conditions.

#### **Summary of Engrossed Second Substitute Bill:**

##### Evaluations and Petitions for Involuntary Treatment.

For criminal defendants who have had felony charges dismissed due to incompetency, evaluation for the purposes of filing a civil commitment petition under the ITA must occur at a state hospital.

##### Grounds for Involuntary Treatment After a Felony Dismissal.

On an initial petition for commitment of a person who has had a violent felony dismissed due to incompetency, in addition to the standard criteria for commitment, the court must make a finding as to whether the acts the person committed constitute a violent offense as defined in statute.

On subsequent petitions for continued commitment of a person who has had a violent felony charge dismissed, when the court has made the additional finding at the initial petition, the person will be committed for up to an additional 180 days whenever prima facie evidence exists that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood of the person committing acts similar to the criminal behavior. The committed person may only challenge their continued commitment with admissible expert opinion indicating that their condition has changed such that the mental disorder or developmental disability no longer presents a substantial likelihood that they will commit acts similar to the charged criminal behavior. Additional terms of commitment may

include transfer to a specialized intensive support and treatment program, which may be initiated prior to or after release from the state hospital.

Release of Involuntarily Detained People.

The prosecuting attorney of the county in which the criminal charges against the committed person were dismissed is entitled to notice of impending release, change in commitment status, or escape of a person involuntarily committed after dismissal of a sex, violent, or felony harassment offense.

The jurisdiction of the independent NGRI review panel is expanded to require the panel to review decisions and provide advice regarding persons committed under the ITA where the court has made an additional finding that person committed acts constituting a violent offense. In particular, the panel must review all decisions to change the person's commitment status or to not seek further commitment. The panel's report to the Legislature will include recommendations as to whether further changes in the law are necessary to enhance public safety when incompetency prevents the operation of the criminal justice system.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on March 11, 2013.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony (Judiciary):**

(In support) This bill is designed to address gap cases. When someone is not competent, they cannot be tried criminally. Instead, they are referred to the civil commitment system, from which they are often quickly released, even when the underlying charges were for extremely serious crimes. Once a person has been charged with a violent felony and they are too mentally ill to be held, they should not be released until a judge can commit them. Genuine cases of mental illness need to be handled in the civil system, and evaluations should happen in the state hospitals. There is no space in local facilities and people are sitting in hallways in emergency rooms.

The bill does not lower the standard for institutionalizing someone; instead the bill creates an additional finding when the charge was for a violent felony. The state is given a greater burden to meet upfront. Once that additional standard is met, there is a greater ability to hold the person for a longer time until the risk is addressed. This standard will not apply to many cases, but those it does apply to are especially dangerous. There will be a good return on the investment in terms of public safety.

The reworking of the intent section is a welcome change from earlier drafts of the bill. More work is needed to change references to refer to people with mental illness, which is more respectful than saying mentally ill people. The bill should also be amended to recognize that sometimes the entire 180 days is not necessary because restoration may occur more quickly than that. Additionally, there are funding issues that need to be addressed. People subject to the new standard need to produce an admissible expert opinion that they have been restored,

but most people in this situation are indigent, so a provision for indigent assistance should be added.

(Other) Removing the ability to use an evaluation and treatment facility for evaluations is a good idea. The courts are ordering the ITA evaluations to happen in the emergency department, but an emergency room is not a forensic environment. There are insufficient beds and other resources to support this. Sending people to the emergency room delays treatment and puts a strain on the hospital. This bill does not change the process, just the destination. People who have been ordered for an evaluation are being turned away, which, from a public safety perspective is dangerous.

There is a problem with requiring an assessment of competency in the civil system, because this is a standard that is never dealt with in the ITA courts. That is a criminal standard. Translating that standard to the civil side will add costs, require experts, prolong hearings, and increase inpatient treatment costs. Money should be going to outpatient treatment instead. There is also a due process concern with the section of the bill regarding subsequent terms of commitment. The new standard does away with an evidentiary hearing and a trial, and reduces the burden of proof from clear, cogent, and convincing to a prima facie showing.

The bill also shifts the burden to the defense. The reference to the public safety review panel needs to be removed. Having to go through that board delays cases and that board only meets once a month.

(In support with concerns) Requiring evaluations to take place at state hospitals creates a problem for individuals who are ultimately not subject to commitment who have to be sent back. There is also a fiscal concern in that there are a limited number of beds and they serve three purposes: not guilty by reason of insanity commitment, competency evaluations and restoration, and forensic flip evaluations for felons and misdemeanants. There are competency timelines, and a lot of competition for a limited resource.

The intent behind the developmental disabilities benefits is good, but the developmental disabilities system already has a lot of people trying to get services. This creates a preference over everyone who is already waiting.

(Opposed) This proposal raises constitutional as well as capacity questions. It would be more appropriate to address the capacity problem at this time. It is probable that the problem is just being moved around, and creating delays for people awaiting competency evaluations and restoration. The current capacity issue will be aggravated without adding beds.

The initial intent section was inflammatory, and needed to be rewritten. However, fixing the intent section does not fix the constitutional problems associated with bypassing existing process. Taking away the option of the judge to allow release during the evaluation assumes dangerousness. Reducing the standard from clear and convincing to a prima facie showing is constitutionally dubious.

Using the independent public safety review panel will work as a barrier to patient recovery. This will cause delays as people wait for review, which increase expense. This idea needs further vetting.

It is unclear what developmental disability services will actually be provided. Clarification is needed in order for that language to be effective.

**Staff Summary of Public Testimony (Appropriations):**

(In support) This bill attempts to address some gaps in current law. There is a group of individuals who commit acts that would otherwise be considered crimes if they were competent to stand trial but who are determined incompetent to stand trial so they flip into the civil system. If the civil system does not believe they can be cured, they flip out of the civil system and go back out into the streets. A number of them have continued to commit acts against other people that would otherwise be considered crimes. It is a terrible cycle and has a high cost for members of the public and for the criminal justice system. There are a number of cases where there have been tragic outcomes because these people can not be held and treated.

The biggest driver in the fiscal note was a requirement to provide services to individuals with developmental disabilities if they had crimes dismissed because they were incompetent. This requirement has been removed entirely from the substitute bill. On the issue of the state hospital evaluating people for civil commitment, there is a change that allows the state hospitals to screen individuals so they do not have to transport individuals who are going to be released anyway. The biggest driver of cost in the current form of the bill are provisions that allow individuals who have charges for felony crimes dismissed due to incompetency to be committed for additional periods at the hospitals' discretion. The fiscal note's projection of 10 beds is probably accurate. As you consider other legislation this session which may also increase the need for beds at the state hospital, this bill should only be credited toward about a third of the costs for the need for a new ward at the state hospital. There are already significant resources expended on these cases as they bounce back and forth between the state hospitals and the criminal justice system.

There are about 20 violent felons who are incompetent to stand trial but do not meet the civil commitment standard. These individuals are in the community and they are continuing to be crime victims and to commit crimes. The cost-benefit ratio is significantly in favor of doing this and it does have a significant impact on community safety.

The substitute bill makes positive changes which acknowledge that individuals with mental illnesses are more likely to be the victims than the perpetrators of a crime. The bill addresses a very real gap between the civil commitment and criminal justice system.

There are about six to 10 people in Seattle per month who are determined not competent to stand trial, and over the past year there were over 49 people turned away without a civil commitment evaluation. Section 3 of the bill addresses this and we are open to considering other approaches to fix this problem.

(With concerns) Section 3 of the bill makes the state hospitals the default for evaluations for individuals with misdemeanor crimes whose charges have been dismissed due to incompetency. Individuals who are not going to meet the involuntary treatment standard should remain within their communities rather than being sent to the state hospitals. This

appears to be a King County-specific issue and the Department of Social and Health Services is working with the county on solutions to these issues.

(Opposed) None.

**Persons Testifying (Judiciary):** (In support) Representative Pedersen, prime sponsor; Tom McBride, Washington Association of Prosecuting Attorneys; Mark Lindquist, Pierce County Prosecuting Attorneys; Seth Dawson, National Alliance on Mental Illness; Amnon Shoenfeld, King County; and Ronnie Roberts, Olympia Police Department and Sheriffs and Police Chiefs Association.

(Other) Darcy Jaffe, Harborview Medical Center; Kelsey Beck, City of Seattle; Mike De Felice, Washington Defender Association; and Rick Hertzg, Western State Hospital.

(In support with concerns) Jane Beyer, Aging and Disability Services, Department of Social and Health Services.

(Opposed) David Lord, Disability Rights Washington; and Shankar Narayan, American Civil Liberties Union of Washington.

**Persons Testifying (Appropriations):** (In support) Representative Pedersen, prime sponsor; Tom McBride, Washington Association of Prosecuting Attorneys; Don Pierce, Washington Association of Sheriffs and Police Chiefs; Sandi Ando, National Association of Mental Illness of Washington; and Kelsey Beck, City of Seattle.

(With concerns) Jane Beyer, Department of Social and Health Services, Aging and Disability Division.

**Persons Signed In To Testify But Not Testifying (Judiciary):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.